No. 83-988

In the Supreme Court of the United States

OCTOBER TERM, 1983

ALONZO BERRONG AND JACK MCKAY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the warrantless entry onto petitioner Berrong's open field violated the Fourth Amendment.

2. Whether the conspiracy terminated before the making of certain co-conspirator statements that were admitted into evidence.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 2a-11a) is reported at 712 F.2d 1370.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on August 22, 1983. A petition for rehearing (Pet. App. 1b-2b) was denied on October 13, 1983. The petition for a writ of certiorari was filed on December 12, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioners were convicted of conspiracy to possess marijuana with intent to distribute, in violation of 21 U.S.C. 846, and possession of marijuana with intent to distribute, in violation of 21

U.S.C. 841(a)(1). Petitioner McKay was sentenced to consecutive terms of 15 years' imprisonment on the conspiracy count and 10 years' imprisonment on the possession count, to be followed by a five year special parole term. He was also fined $50,000. Petitioner Berrong was sentenced to concurrent terms of 10 years' imprisonment on each of the two counts, to be followed by a special parole term of five years. He was also fined $50,000. The court of appeals affirmed (Pet. App. 2a-11a).

1. The evidence adduced at trial established that in July 1981, petitioner McKay, Sheriff of Towns County, Georgia, told Chief Deputy Sheriff Jimmy McKinney that he was involved with petitioner Berrong and several others in growing marijuana on property owned by Berrong. McKay said that the people living near the marijuana field were using security dogs to guard the field. McKay also told McKinney that the marijuana would be harvested between August 5 and 15. 5 R. 528-529.[1] On July 30, 1981, Deputy McKinney advised Special Agent Charles King of the Georgia Bureau of Investigation (GBI) of what McKay had told him (8 R. 92; Pet. App. 4a).

On August 2, 1981, Agent King and Deputy McKinney hired an airplane and pilot and flew over the Berrong property. From an altitude of about 800 feet, Deputy King was able to see a field of marijuana. On August 4, Agent King again flew over the property and confirmed his earlier observation that the field contained marijuana. 8 R. 92-94; Pet. App. 4a-5a.

The next day Agent King instructed Deputy McKinney to call petitioner McKay and tell him that King had information that marijuana was being grown on the Berrong

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[1] "R." refers to the record in the court of appeals. Record references are taken from the government's brief in the court of appeals.

property and that King planned to go there that day to investigate (5 R. 639-640; 8 R. 147). At the time of the call, GBI agents were already stationed in the woods surrounding the marijuana field, hoping to capture the marijuana growers as they tried to harvest the crop. When almost six hours had passed without anyone coming, the agents raided the field and seized 4,000 pounds of marijuana, as well as a camper trailer and an alarm system. 7 R. 291, 303-308, 377-378; Pet. App. 5a. No arrests were made at that time.

On August 13, 1981, petitioner McKay told Deputy McKinney that he and his associates had lost $20,000 that they had invested in the marijuana field and in equipment. He said that the man who had been living in the camper and growing the marijuana would be back after the first of the year. McKay asked whether McKinney knew of any cave in Towns County where they might grow marijuana, using portable generators and fluorescent lamps. 5 R. 646-647.

On October 14, 1981, Deputy McKinney had a conversation with petitioner Berrong, which was tape recorded. Berrong said that he had the dog box in his house for the guard dogs that had been used to guard the raided marijuana field. He said he had killed one of the dogs because it became vicious. He also told McKinney that on the morning of the raid there were four people at the camper trailer near the marijuana field and that the man who lived in the camper was named Dave. 5 R. 647-648.

In a taped conversation between petitioner McKay and Deputy McKinney on October 28, McKay told McKinney that "Dave" had left Georgia after the August 5 raid and was in Mexico. McKay assured McKinney that only he and petitioner Berrong knew that it was McKinney who had "tipped McKay off" on August 5. McKay told McKinney to stay cool because "they ain't got nothing." Gov't Exh. 26.

On November 5, 1981, Deputy McKinney again spoke with petitioner Berrong and recorded the conversation. Berrong told him that McKay had called Nathan Dowdy to warn him on the morning of the raid and that Dowdy had then warned Berrong. Berrong told McKinney: "They ain't got nobody but me." He said McKay had told him: "If you go to jail, I'm going with you," but Berrong had replied that "nobody goes with me." Berrong told McKinney he would rather go to jail than talk. Gov't Exh. 27.

2. Petitioners moved to suppress certain evidence on the ground that it was the product of a warrantless search of the marijuana field. The motion was denied by the district court. The court of appeals affirmed, holding that the field was outside the curtilage of the Berrong residence and that he had no legitimate expectation of privacy in his open field (Pet. App. 6a-11a).

ARGUMENT

1. Petitioner Berrong contends (Pet. 4-9) that the warrantless entry[2] onto his property violated the Fourth Amendment.[3] This contention is without merit.

a. Petitioner's primary contention (Pet. 4-8) is that the court erred in finding that the field was outside the curtilage. This fact-bound contention is mistaken and plainly does not warrant review by this Court.

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[2]The agents did obtain a warrant at some point, but it is unclear exactly when the warrant was obtained, and the government did not rely on the warrant to justify the August 5 entry. Thus, the court of appeals treated this case as involving a warrantless entry. Pet. App. 7a n.3.

[3]No rights of petitioner McKay could have been violated by the entry onto Berrong's marijuana field, and it seems from the petition that this contention is made only by petitioner Berrong. In addition, the court of appeals' opinion indicates that the claim was raised there only by Berrong (Pet. App. 4a).

Curtilage is a common law concept denoting an area surrounding the house that is habitually used for family purposes and hence is of heightened privacy interest. See *United States* v. *Van Dyke*, 643 F.2d 992, 993 & n.1 (4th Cir. 1981). In *Care* v. *United States*, 231 F.2d 22, 25 (10th Cir.), cert. denied, 351 U.S. 932 (1956), the court stated that the factors relevant to a determination of the curtilage include "its proximity or annexation to the dwelling, its inclusion within the general enclosure surrounding the dwelling, and its use and enjoyment as an adjunct to the domestic economy of the family." See also *United States* v. *Williams*, 581 F.2d 451, 454 (5th Cir. 1978); *United States* v. *Van Dyke*, 643 F.2d at 994. The field at issue here was not included within an exclusionary fence surrounding the house (see *United States* v. *Van Dyke, supra*), nor was it within the area occupied by the group of structures making up the farm house (see *United States* v. *Williams, supra; Walker* v. *United States*, 225 F.2d 447, 449 (5th Cir. 1955)). The distance from the residence, one-quarter of a mile, is by itself a strong indication that this field is outside the curtilage; no case of which we are aware has held that the curtilage extends to anything approaching that distance. See *United States* v. *Van Dyke*, 643 F.2d at 993; *United States ex rel. Saiken* v. *Bensinger*, 546 F.2d 1292, 1296-1297 (7th Cir. 1976). And finally, a field of marijuana, unlike a yard or garden, is hardly an area closely associated with the privacy expectation of a residence. The court of appeals and the district court were therefore correct in concluding that the marijuana field was beyond the outer limits of the curtilage.[4]

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[4]Petitioner's reliance on *United States* v. *Holmes*, 521 F.2d 859 (5th Cir. 1975), aff'd by an equally divided court, 537 F.2d 227 (5th Cir. 1976) (en banc), is unavailing. As the Fifth Circuit explained in a later case, because the full court was equally divided on this issue the judgment of the district court was affirmed, and the panel's opinion has no precedential value. See *United States* v. *Williams*, 581 F.2d at 454. In any event, the facts of that case are distinguishable; agents there approached and peered into a shed located 20 yards from a house and 10 yards from a motor home parked behind the house. See 521 F.2d at 862.

b. Petitioner Berrong also argues briefly (Pet. 8-9) that, even if the marijuana was not within the curtilage, the agents nevertheless were not entitled to enter his field without a warrant. Petitioner correctly notes that there are several cases now pending before this Court concerning the scope of the "open fields doctrine." Because the court of appeals did rely on the open fields doctrine in upholding the entry onto petitioner's field, this Court will perhaps wish to consider whether to hold this case pending its decisions in *Oliver* v. *United States*, No. 82-15 (argued Nov. 9, 1983); and *Maine* v. *Thornton*, No. 82-1273 (argued Nov. 9, 1983). We do not believe such action is necessary.

Even if the defendant's arguments are accepted in *Oliver* and *Thornton*, and the open fields doctrine modified, it is most unlikely that petitioner would be entitled to prevail here. In those cases the defendants argued that they had taken steps to exclude the public from their land, thus allegedly negating the applicability of the open fields doctrine of *Hester* v. *United States*, 265 U.S. 57 (1924). Here, however, petitioner does not point to any steps that he took to exclude the public from his property. The court of appeals found that "[t]he record indicates the total absence of any fence, wall, 'no trespassing' signs, or other artificial obstructions to entry on the property" (Pet. App. 9a n.5). The agents simply walked unobstructed through the woods and fields from a public highway to the marijuana field. Thus, unless *Hester* is completely overruled and an individual's bare property interest is held to be sufficient to invoke the protections of the warrant requirement, we submit that the resolution of *Oliver* and *Thornton* will not affect the correctness of the decision below.[5]

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[5]Even if the Court were disposed to hold the present petition pending decision in *Oliver* and *Thornton*, it should do so only with respect to petitioner Berrong and should forthwith deny McKay's petition, since the validity of his conviction is unaffected by the "open fields" issue. See p. 4, n.3, *supra*.

2. Petitioner McKay claims (Pet. 9-13) that the district court erroneously admitted into evidence certain co-conspirator declarations, which he maintains were made after the termination of the conspiracy. Relying on *Krulewitch* v. *United States*, 336 U.S. 440 (1949), and *Lutwak* v. *United States*, 344 U.S. 604 (1953), petitioner McKay argues that the conspiracy came to an end when the marijuana field was destroyed on August 5, 1981, and hence that the October 14 and November 5 conversations between McKinney and Berrong implicating McKay were inadmissible.[6] He contends that, as in *Krulewitch* and *Lutwak*, the government cannot achieve admission of these statements by claiming that they were made as part of a further conspiracy to conceal, where no such agreement was alleged or proven.

But petitioner McKay is mistaken in his basic premise that the conspiracy ended with the August 5 raid on the marijuana field.[7] Simply because that particular crop was destroyed did not mean the end of the group's marijuana growing operation. Petitioners had not been arrested, and they were not prevented from continuing with the conspiracy. See *United States* v. *Thompson*, 533 F.2d 1006, 1010-1011 (6th Cir. 1976); *United States* v. *Sarno*, 456 F.2d 875, 878 (1st Cir. 1972). Petitioner McKay himself told Deputy

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[6]Petitioner McKay does not explain how the October 14 conversation inculpated him; it does not appear to involve him at all. See page 3, *supra*.

[7]Although the indictment did state that the conspiracy lasted until on or about August 5, 1981, the government is not limited to that period for purposes of introducing co-conspirators' statements. Fed. R. Evid. 801(d)(2)(E) does not require that the conspiracy upon which admissibility of the statement is predicated be that charged. Indeed, the rule does not require that a conspiracy be charged in the indictment at all, as long as a concert of action between the defendant and the extra-judicial declarant is established. See *United States* v. *Monaco*, 702 F.2d 860, 880 n.35 (11th Cir. 1983); *United States* v. *Postal*, 589 F.2d 862, 886 n.41 (5th Cir. 1979).

McKinney on August 13 that the man who had been in charge of growing the marijuana would return later, and he told of their plans to try growing marijuana in a cave; indeed, he asked McKinney if he knew of any cave in the county that they might use (5 R. 647-648). Later McKay told McKinney to "stay cool," that they had not been found out, and that he thought the marijuana field had been raided only because Agent King wanted a share of their operation (Gov't Exh. 26). All these statements, admissible against McKay as his own admissions, made clear that the conspiracy was still going on. The August 5 raid terminated only the success of that particular crop, not the plans for the operation as a whole. See *United States* v. *Katz*, 601 F.2d 66, 68 (2d Cir. 1979).

The statements made by petitioner Berrong on October 14 and November 5 were made in furtherance of the ongoing conspiracy. Berrong explained more details of the operation to McKay and assured him that no one would reveal the identities of the participants to the authorities. Their plans for future crops therefore could continue. Thus, the courts below correctly concluded that these statements were admissible under the co-conspirator hearsay exception.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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